IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 31, 2007 Session

LAMAR OUTDOOR ADVERTISING CO. and SAM FURROW
v.
TENNESSEE DEPARTMENT OF TRANSPORTATION

An Appeal from the Chancery Court for Davidson County
No. 05-241-I Claudia Bonnyman, Chancellor

No. M2006-00915-COA-R3-CV - Filed on August 14, 2007

This case involves state billboard laws and regulations. The plaintiff billboard owner owned three wooden billboard structures permitted as grandfathered, non-conforming devices. In 2000, a storm damaged one of the billboard structures. The plaintiff obtained permission from the defendant Department of Transportation to rebuild the damaged billboard structure in accordance with the "natural disaster" provision of Tenn. Comp. R. & Regs. 1680-2-3-.04, which required that grandfathered non-conforming signs damaged during a natural disaster be rebuilt "to their original height and size using like materials." The plaintiff billboard owner then tore down all three of its wooden billboards and in their place erected a single, larger steel billboard structure. The Department of Transportation found that the larger steel structure constituted a new sign built without a valid permit and in violation of current spacing requirements, and terminated the permits for the three grandfathered wooden billboards. After exhausting all administrative remedies, the plaintiff billboard owner appealed the Department of Transportation's decision to the trial court. The trial court affirmed, and the plaintiff now appeals. We affirm, finding that the plaintiff billboard owner did not rebuild the damaged billboard structure to the "original height and size" as required by the natural disaster regulation. Consequently, the new larger steel billboard structure must be considered a new sign erected without a valid permit and in violation of current spacing requirements. The Department of Transportation was, therefore, warranted in terminating the plaintiff's billboard permit number and in ordering that the new sign be removed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Affirmed.

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which ALAN E. HIGHERS, J., and DONALD P. HARRIS, SR. J., joined.

Gregory P. Isaacs, Knoxville, Tennessee, for appellants, Lamar Outdoor Advertising Co. and Sam Furrow.

Robert E. Cooper, Jr., Attorney General & Reporter, Sharon G. Hutchins and Bruce M. Butler, Assistant Attorneys General, Nashville, Tennessee, for appellee, Tennessee Department of Transportation.

OPINION

Plaintiff/Appellant Lamar Outdoor Advertising Co. ("Lamar") owned three billboard structures erected in 1967. The billboard structures were constructed of wood and stood adjacent to one another. All three were visible from Interstate 40 Westbound in Knox County at log mile 29.76. After the enactment of the Billboard Regulation and Control Act of 1972, see T.C.A. § 54-21-101 *et seq*., these structures became pre-existing, non-conforming, and legally grandfathered outdoor advertising devices. The billboard permits—numbers 47-0607, 47-2049, and 47-2609—were renewed on a yearly basis as required by law.

In November 2000, a storm damaged the billboard structure bearing permit number 47-0607. On April 4, 2001, Lamar notified Defendant/Appellee Tennessee Department of Transportation ("TDOT") that it intended to rebuild the structure. In a letter dated April 5, 2001, TDOT's Region I Highway Beatification Office gave Lamar permission to rebuild the storm-damaged structure, mandating that it be rebuilt in compliance with the "natural disaster" provision of Tenn. Comp. R. & Regs. 1680-2-3-.04. The letter stated that "the structure must be rebuilt at the same size with like materials . . . . The structure is on wood poles; therefore, it can only be reconstructed with wooden poles."[1] The letter also informed Lamar that the sign had to be rebuilt "on the exact location" of the damaged structure.[2]

After receiving TDOT's April 5, 2001 letter, Lamar tore down all three of the grandfathered billboard structures located at log mile 29.76. In their place, Lamar built one billboard structure bearing the original permit number 47-0607. The newly-constructed billboard was erected on steel poles rather than wooden poles. Instead of a 12 x 32-foot wooden face, the new billboard had a larger 14 x 48-foot steel face. The new billboard was erected approximately five feet from the location of the original, storm-damaged structure. Lamar did not rebuild the other two billboard structures at that location.

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[1] The natural disaster regulation provided that:

> A non-conforming device or grandfathered non-conforming device will be allowed to be rebuilt in the case of natural disaster. Non-conforming and grandfathered non-conforming devices destroyed or damaged during a natural disaster may be rebuilt to their original height and size using like materials.

Tenn. Comp. R. & Regs. 1680-2-3-.04(2) (2003).

[2] Pursuant to Tenn. Comp. R. & Regs. 1680-2-3-.04(1)(a)(2), under "no circumstances" may the location of a grandfathered non-conforming device be changed.

During the course of a routine inspection in July 2001, TDOT discovered that Lamar had removed the original three wooden billboards and erected a larger, steel billboard in place of the storm-damaged structure. On July 26, 2001, TDOT notified Lamar that permit numbers 47-2049 and 47-2607 had been terminated because the billboards were removed. TDOT also informed Lamar that it had terminated permit number 47-0607, the permit number for the original damaged wooden billboard structure. TDOT investigators had determined that the billboard structure bearing permit number 47-0607 constituted a new sign built without a valid permit, see T.C.A. § 54-21-104, and in violation of spacing requirements.[3] Lamar contested TDOT's findings regarding permit number 47-0607 and requested an administrative hearing.

On December 10, 2003, the matter was heard before an Administrative Law Judge ("ALJ"). The ALJ's initial order was entered on April 21, 2004. In the order, the ALJ first determined that the fact that the new billboard was erected five feet from the original location did not constitute a violation of Tenn. Comp. R. & Regs. 1680-2-3-.04(1)(a)(2), based on evidence establishing that it was neither feasible nor safe to install new support footers in the exact location where the footers for the damaged structure existed. Nevertheless, the ALJ found that Lamar had violated the "natural disaster" provision of Tenn. Comp. R. & Regs. 1680-2-3-.04, in that (1) the new billboard structure was not the "original height and size" of the damaged sign, and that (2) the new billboard structure was made of steel rather than wood, and steel is not a "like material" to wood as required under the regulation. Accordingly, the ALJ concluded that TDOT appropriately terminated permit number 47-0607 and that the newly-constructed sign was subject to removal pursuant to section 54-21-105 of Tennessee Code Annotated. Lamar filed a motion to reconsider the initial order, which was denied.

Lamar appealed the ALJ's initial order to the Commissioner of TDOT. On December 1, 2004, the Commissioner entered a final order, stating in pertinent part:

> 9. In this case, the original grandfathered non-conforming device bearing Permit #47-0607 had been erected on wooden poles with a wooden sign face that was 12 feet high and 32 feet wide. Lamar removed this original billboard and replaced it with a billboard erected on steel poles with a steel face that is 14 feet high and 48 feet wide. The [ALJ] correctly concluded that the 14x48-foot rebuilt sign is not the "original height and size" of the 12x32-foot sign it replaced, and he also correctly concluded that replacing a wooden structure with a steel structure cannot, by any reasonable definition, be considered a rebuilding of the original billboard using "like materials" as required in TDOT Rule 1680-2-3-.04(2).
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> 10. Accordingly, the billboard . . . that Lamar has erected on steel poles with a 14x48-foot steel sign face must be considered a new billboard rather than a rebuilding of the original grandfathered non-conforming device bearing Permit #47-

[3] The storm-damaged billboard structure stood approximately 500 feet away from another permitted sign on the same side of Interstate 40 Westbound. Current regulations mandate that "[n]o two structures shall be spaced less than 1000 feet apart on the same side of the highway." Tenn. Comp. R. & Regs. 1680-2-3-.03(1)(a)4(i)(I) (2003). The newly-constructed billboard sign stands 506 feet away from the permitted sign.

> 0607. Therefore, this new billboard is not authorized as a grandfathered non-conforming device under Permit #47-0607, and it is illegal because it has been erected and maintained without a permit. Tenn. Code Ann. § 54-21-104(a). Moreover, this new billboard has been erected at a location that cannot be lawfully permitted because it is less than 1,000 feet away from another permitted billboard on the same side of Interstate 40. TDOT Rule 1680-2-3-.03(1)(a)4(i)(I). Because it is illegal, this new billboard is a public nuisance subject to removal at the expense of the owner of the billboard and the owner of the property. Tenn. Code Ann. § 54-21-114.
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> 11. The grandfathered non-conforming device authorized under Permit #47-0607 has not been rebuilt within 12 months following the natural disaster that destroyed it; therefore, it must be considered an abandoned site, TDOT Rule 1680-2-3-.04(2), and Permit #47-0607 shall no longer be a valid permit for a grandfathered non-conforming device at the relevant location.
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> 12. The [ALJ] also concluded . . . that rebuilding a billboard five feet away from the original location of the grandfathered non-conforming device should not be considered a "change in location" of the sign in violation of TDOT Rule 1680-2-3-.01(1)(a)2. Whatever the practical reasons may have been for erecting the new sign in a location five feet away from the original sign, the fact remains that there has been a measurable change in location. It is not necessary to the holding in this case, however, to decide whether a change of this magnitude should be considered a violation of the rule. Therefore, [this] conclusion of law . . . is expressly NOT ADOPTED, and the legal issue is reserved for another time.

Thus, the Commissioner found that the new billboard erected by Lamar violated the "natural disaster" regulation in that it was not the "original height or size" of the damaged structure that it replaced, and also because it was not built with "like materials." As to the five-foot change in location, the Commissioner did not adopt the ALJ's findings, but determined instead that it was unnecessary to decide whether the five-foot relocation violated Tenn. Comp. R. & Regs. 1680-2-3-.04(1)(a)2. Based on these findings, the Commissioner terminated permit number 47-0607 and ordered that the illegal billboard structure be immediately disassembled and removed from the premises.

Following issuance of the Commissioner's order, on January 28, 2005, Lamar filed a petition for certiorari in the Chancery Court for Davidson County, seeking judicial review of the Commissioner's decision. By agreed order, the petition was amended to reflect that it was a petition for review of a contested case pursuant to the Uniform Administrative Procedures Act ("UAPA"), T.C.A. § 4-5-322. The chancellor heard the matter on January 6, 2006, and entered a memorandum and order affirming the Commissioner's decision in all respects on March 21, 2006. From this order, Lamar now appeals.

The issues raised on appeal are: (1) whether Lamar should have been permitted to rebuild the storm-damaged billboard structure in accordance with the "extraordinary maintenance" provision,

Tenn. Comp. R. & Regs. 1680-2-3-.04(1)(b); (2) whether substantial and material evidence supports the Commissioner's finding that the new billboard sign was not rebuilt to the "original height and size" of the billboard structure it replaced, as required under the "natural disaster" provision of Tenn. Comp. R. & Regs. 1680-2-3-.04; (3) whether the Commissioner's findings and conclusions that steel is not a "like material" to wood was based upon an unlawful procedure, on the ground that the Commissioner was attempting to implement a policy not properly promulgated under the UAPA, see T.C.A. § 4-5-216; and (4) whether the reconstruction of a damaged sign within five feet of its original location constitutes a prohibited change in location under Tenn. Comp. R. & Regs. 1680-2-3-.04(1)(a)2.

The standard of review in this case is governed by section 4-5-322(h) of the Tennessee Code Annotated. This statute authorizes courts to affirm or remand agency decisions; reversal or modification must be based on one or more of the five enumerated grounds. ***See City of Memphis v. Civil Service Comm'n***, 216 S.W.3d 311, 316 (Tenn. 2007). Under the statute, an agency decision may be reversed or modified only "if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions" are:

> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
> (5)(A) Unsupported by evidence that is both substantial and material in the light of the entire record.

T.C.A. § 4-5-322(h) (2005).

The term "substantial evidence" is not defined in the statute, but is generally described as "something less than a preponderance of the evidence, but more than a scintilla or glimmer." ***E.g.*, *Wayne County v. Tennessee Solid Waste Disposal Control Bd.***, 756 S.W.2d 274, 280 (Tenn. Ct. App. 1988) (citations omitted); ***Pace v. Garbage Disposal***, 390 S.W.2d 461, 463 (Tenn. Ct. App. 1965). "In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." T.C.A. § 4-5-322(h)(5)(B); ***see also Bobbitt v. Shell***, 115 S.W.3d 506, 510 (Tenn. Ct. App. 2003). Simply stated, the evidence must be such that "a reasonable mind might accept to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration." ***Southern Ry. Co. v. State Bd. of Equalization***, 682 S.W.2d 196, 199 (Tenn. 1984); ***see also Jackson Mobilphone Co., Inc. v. Tennessee Pub. Serv. Comm'n***, 876 S.W.2d 106, 111 (Tenn. Ct. App. 1993).

The standard of review for this Court is the same as in the trial court. ***Mosley v. Tennessee Dep't of Commerce and Ins.***, 167 S.W.3d 308, 316 (Tenn. Ct. App. 2004). Under section 4-5-322(h) of the Tennessee Code Annotated, therefore, our review of factual findings is limited to a

determination of whether there is substantial and material evidence to support them. ***Id.*** at 316 (citing ***Goldsmith v. Roberts***, 622 S.W.2d 438 (Tenn. Ct. App. 1981)). Conclusions of law, however, are reviewed *de novo* upon the record with no presumption of correctness. ***Wellmont Health System v. Tennessee Heath Facilities Comm'n***, No. M2002-03074-COA-R3-CV, 2004 WL 193074, at *4 (Tenn. Ct. App. Jan. 29, 2004).

In 1972, the General Assembly enacted the Billboard Regulation and Control Act, see 54-21-101 *et seq*., in direct response to the Federal Highway Beautification Act of 1965. Under the Federal Highway Beautification Act, states must effectively control the erection and maintenance of outdoor advertising signs located within 660 feet of and visible from interstates and primary highways, or risk losing ten percent of the federal-aid highway funds received from the federal government. 23 U.S.C. § 131(a)-(c) (2000). To assure that minimum controls are in place, the Federal Highway Administration (FHWA) adopted regulations prescribing certain policies and requirements for outdoor advertising. Nevertheless, states are permitted to establish "more stringent" outdoor advertising controls than provided in the federal regulations. 23 C.F.R. § 750.701 (2003). Section 54-21-112 of the Tennessee Code Annotated confers full authority upon the Commissioner of TDOT to "promulgate and enforce any and all regulations as required and necessary to fully carry out" the provisions of the Billboard Act and 23 U.S.C. § 131.

The federal regulations expressly provide that states may adopt "grandfather clauses" for billboard structures lawfully erected before the adoption of laws and regulations applicable to new signs. 23 C.F.R. § 750.707(c) (2003). A "grandfather clause" allows pre-existing billboard structures to remain in place even though they do not conform to current size, lighting, or spacing requirements. 23 C.F.R. § 750.707(c). However, a grandfathered sign may only continue to remain "at its particular location for the duration of its normal life subject to customary maintenance." 23 C.F.R. § 750.707(c). The grandfathered sign must "remain substantially the same as it was on the effective date" of the current state law or regulation. 23 C.F.R. § 750.707(d)(5) (2003). Each state is empowered to develop criteria for determining "when customary maintenance ceases and a substantial change has occurred which would terminate nonconforming rights." 23 C.F.R. § 750.707(d)(5).

Following these directives, TDOT has adopted its own regulatory scheme for outdoor advertising signs in Tennessee. TDOT's regulations define a grandfathered, non-conforming device as follows:

> *Grandfather Non-Conforming Device*, means one which was lawfully erected prior to the passage of the state law which is located in a legal area as defined by the law but which does not meet the size, lighting, or spacing criteria as set forth in the Agreement entered into between the Department of Transportation and the Federal Highway Administration which is part of the law.

Tenn. Comp. R. & Regs. 1680-2-3-.02(11) (2003). In accordance with the federal regulations, a grandfathered, non-conforming device is allowed to remain in place subject to the following restrictions:

> 1. Maintenance beyond customary maintenance will not be allowed. Customary maintenance is defined as the replacement of the sign face or stringers, but not the replacement of any pole, post, or support structure.
> 2. Under no circumstances may the location be changed.
> 3. Extension or changing height above ground level or enlargement of the sign face will not be allowed.
> 4. Lighting cannot be added to an unilluminated sign.
> 5. Reflective material cannot be added to an unreflectorized sign.

Tenn. Comp. R. & Regs. 1680-2-3-.04(1)(a) (2003).

Beyond "customary maintenance," the regulations permitted the permit holder for a non-conforming billboard structure to perform "extraordinary maintenance" under limited circumstances. Tenn. Comp. R. & Regs. 1680-2-3-.04(1)(b) (2003).[4] Such "extraordinary maintenance" was available only to one "holding permits for three or more outdoor advertising devices which have a non-conforming status." Tenn. Comp. R. & Regs. 1680-2-3-.04(1)(b). In order to do so, "[t]wo (2) non-conforming devices must be removed before a third device can be considered eligible for extraordinary maintenance." Tenn. Comp. R. & Regs. 1680-2-3-.04(1)(b). Under this provision, under limited circumstances, the permit holder was permitted to update and rebuild a billboard structure larger than the structure it replaced. Tenn. Comp. R. & Regs. 1680-2-3-.04(1)(b)7, 11 (2003).[5]

In addition to the "extraordinary maintenance" provision, TDOT enacted a further exception to the "customary maintenance" restriction, governing circumstances in which a grandfathered, nonconforming billboard structure is damaged by a "natural disaster." This "natural disaster" provision states:

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[4]The extraordinary maintenance regulation provided that:

> Maintenance which extends beyond the standard use of customary maintenance of non-conforming devices will be allowed on certain non-conforming devices, provided the following numbered criteria are met. This type of maintenance is extraordinary maintenance. Two (2) non-conforming devices must be removed before a third device can be considered eligible for extraordinary maintenance. Those individuals or companies holding permits for three or more outdoor advertising devices which have a non-conforming status will be able to participate.

Tenn. Comp. R. & Regs. 1680-2-3-.04(1)(b) (2003).

[5]TDOT has since deleted the extraordinary maintenance regulation from Tenn. Comp. R. & Regs. 1680-2-3-.04.

> A non-conforming device or grandfathered non-conforming device will be allowed to be rebuilt in the case of natural disaster. Non-conforming and grandfathered non-conforming devices destroyed or damaged during a natural disaster may be rebuilt to their original height and size using like materials.
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> For the purpose of this rule, a natural disaster is a destructive act of nature causing great damage or loss. Weather conditions resulting in the destruction or damage of outdoor advertising devices must be verified by the local authorities or weather service. Permit holders must inform the Department, in writing, concerning the destruction of such devices as soon as possible. Restoration of a destroyed or damaged outdoor advertising device must be completed within twelve (12) months following the disaster or the outdoor advertising device site will be considered abandoned.

Tenn. Comp. R. & Regs. 1680-2-3-.04(2) (2003). Thus, if a natural disaster destroyed or damaged a grandfathered, non-conforming sign, this provision allowed the permit holder to rebuild the structure to its "original height and size using like materials."[6]

Lamar argues on appeal that it was permitted, under Tenn. Comp. R. & Regs. 1680-2-3-.04, to rebuild the storm-damaged structure in accordance with subsection (1)(b) of the rule, the "extraordinary maintenance" provision. However, the appellate record contains no indication that Lamar raised this issue in the proceedings below. Lamar is not permitted to raise an issue for the first time on appeal. Tenn. R. App. P. 36(a) (2005); ***see also Johnston v. Houston***, 170 S.W.3d 573, 578 (Tenn. Ct. App. 2004). Therefore, we decline to address this issue.

Next, Lamar argues that there is not substantial and material evidence in the record to support the Commissioner's finding that Lamar violated the "natural disaster" provision by replacing the wooden, storm-damaged billboard sign located at log mile 29.76 on Interstate 40 Westbound and bearing permit number 47-0607 with a larger, steel billboard structure. In its appellate brief, Lamar focuses almost exclusively on the "like materials" requirement, arguing vigorously that the phrase "like materials" does not require that a wooden sign be replaced with wooden components, that the word "like" does not mean that a storm-damaged sign must be rebuilt using the "exact" materials used in the original construction, and that steel supports are currently preferred over wood supports according to industry standards and as a matter of safety. Lamar does not address the requirement that a billboard structure damaged or destroyed by a natural disaster must be rebuilt to its "original height and size."

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[6] Since the instant dispute arose, TDOT deleted the natural disaster provision from Tenn. Comp. R. & Regs. 1680-2-3-.04. The new rule allows rebuilding or repairs beyond customary maintenance only for grandfathered non-conforming devices destroyed or damaged as a result of vandalism and "some other criminal and tortious acts." Tenn. Comp. R. & Regs. 1680-2-3-0.4(2) (2007). The new rule requires that the new device must be rebuilt "with materials that replicate the materials used to construct that same component in the original device (e.g., wood for wood, steel for steel, etc.)." Tenn. Comp. R. & Regs. 1680-2-3-0.4(2)(e)3 (2007).

Although Lamar has energetically argued that the new steel billboard structure conforms to the "like materials" requirement, we find that the "original height and size" requirement of Tenn. Comp. R. & Regs. 1680-2-3-.04(2) is dispositive in this case. TDOT's rules and regulations contain a general restriction that prohibits permit holders from enlarging the sign face of a grandfathered, nonconforming device. Tenn. Comp. R. & Regs. 1680-2-3-.04(1)(a)3 (2003). Consistent with this general restriction, the natural disaster provision allows damaged or destroyed billboard structures to be rebuilt, but only to their "original height and size." Tenn. Comp. R. & Regs. 1680-2-3-.04(2) (2003).

It is undisputed in this case that the grandfathered, non-conforming billboard structure that was damaged, bearing permit number 47-0607, had a 12 x 32-foot face. It is also undisputed that this structure was replaced with a steel billboard structure supporting a 14 x 48-foot face. The enlargement of the face clearly violates the express and unambiguous language in the regulation stating that "grandfathered non-conforming devices destroyed or damaged during a natural disaster may be rebuilt to their *original height and size* using like materials." Tenn. Comp. R. & Regs. 1680-2-3-.04(2) (2003) (emphasis added). This fact alone constitutes substantial and material evidence to support the Commissioner's conclusion that the new sign carrying original permit number 47-0607 was not rebuilt in accordance with the "natural disaster" provision contained in Tenn. Comp. R. & Regs. 1680-2-3-.04(2).[7]

Accordingly, the new sign structure is not authorized as a grandfathered non-conforming device bearing permit number 47-0607, and it is illegal because it was built without a valid permit, T.C.A. § 54-21-104, and in violation of current spacing requirements, Tenn. Comp. R. & Regs. 1680-2-3-.03(1)(a)4(i)(I). Under these circumstances, TDOT was warranted in terminating permit number 47-0607 and in ordering that the new sign be removed pursuant to section 54-21-105 of the Tennessee Code Annotated. Therefore, the trial court did not err in affirming the decision of the Commissioner of TDOT. This holding pretermits all other issues raised on appeal.

[7] At oral arguments before this Court, counsel for Lamar argued that the size requirement is not controlling under the facts of this case, because the July 26, 2001 letter notifying Lamar of TDOT's finding that the new sign was illegal for lack of a permit, T.C.A. §§ 54-21-103, -104, and for violating spacing regulations, Tenn. Comp. R. & Regs. 1680-2-3-.03, made no mention of the "original height and size" requirement for storm-damaged signs. Counsel for Lamar asserted that the letter did not put Lamar on notice of this violation, which it might have corrected given the opportunity. This argument is without merit. TDOT informed Lamar by letter, dated April 5, 2001, that the replacement sign had to be rebuilt to the "same size" pursuant to Tenn. Comp. R. & Regs. 1680-2-3-.04(2). At any rate, the clear language of the regulation constituted notice to Lamar of the requirement.

The decision of the trial court is affirmed. Costs of this appeal are to be taxed against Plaintiff/Appellant Lamar Outdoor Advertising Co., and its surety, for which execution may issue, if necessary.

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HOLLY M. KIRBY, JUDGE